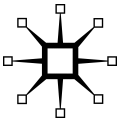

First published 2013 by
PALGRAVE MACMILLAN

Palgrave Macmillan in the UK is an imprint of Macmillan Publishers Limited, registered in England, company number 785998, of Houndmills, Basingstoke, Hampshire RG21 6XS.

Palgrave Macmillan in the US is a division of St Martin's Press LLC, 175 Fifth Avenue, New York, NY 10010.

Palgrave Macmillan is the global academic imprint of the above companies and has companies and representatives throughout the world.

Palgrave® and Macmillan® are registered trademarks in the United States, the United Kingdom, Europe and other countries

ISBN: 978–0–230–21690–7 hardback
ISBN: 978–0–230–21691–4 paperback

This book is printed on paper suitable for recycling and made from fully managed and sustained forest sources. Logging, pulping and manufacturing-processes are expected to conform to the environmental regulations of the country of origin.

A catalogue record for this book is available from the British Library.

A catalog record for this book is available from the Library of Congress.

10 9 8 7 6 5 4 3 2 1
22 21 20 19 18 17 16 15 14 13

Printed in China

Contents

1

Introduction

Miscarriages of justice, used interchangeably in this introduction with the term wrongful convictions, and defined simply as the conviction of those believed to be factually innocent of the criminal offences that they were convicted of, are a perennial problem that plagues the criminal justice system. Yet, despite the devastation that they undoubtedly cause to victims and their families (discussed in Chapter 8), they can act as pointers to the flaws of the criminal justice system in need of corrective reform. Indeed, certain successful appeal cases that exemplify new 'errors' in how miscarriages of justice are caused or in the criminal justice system's ability to overturn alleged miscarriages of justice have been influential in shaping the safeguards that exist to attempt either to prevent them from occurring and/or in introducing the mechanisms for them to be overturned when they do.

A pertinent example of a key landmark in the history of the criminal justice system is the establishment of the Court of Criminal Appeal in 1907, which was intended as creating an opportunity for innocent victims of miscarriages of justice to overturn their convictions (also discussed in Chapter 6). It is intrinsically linked with the case of Adolf Beck who was twice wrongly convicted of larceny in the late nineteenth and early twentieth century due to erroneous eyewitness identification evidence (see Coates, 2001; *The Times*, 1904). Another example of a defining moment in the history of the criminal justice system is the abolition of capital punishment in the UK and the link to the case of Timothy Evans, who was wrongly executed for the murder of his baby daughter Geraldine (see Eddowes, 1955; Kennedy, 1961). The introduction of formal guidelines on police investigations under the Police and Criminal Evidence Act (1984) (PACE) is another relevant illustration that is connected to a high-profile miscarriage of justice case. This time the wrongful convictions of three youths, Colin Lattimore, Ronald Leighton and

Ahmet Salih, for the murder of Maxwell Confait (see Fisher, 1977; Price and Caplan, 1976; Price, 1985). A final example here is the establishment of the Criminal Cases Review Commission (CCRC), the first independent public body in the world with the role of reviewing alleged miscarriages of justice and sending cases back to the relevant appeal court if it is believed that the conviction will be overturned. It took over the role of reviewing alleged miscarriages of justice from the Home Secretary, following revelations that potentially meritorious alleged miscarriage of justice cases, mainly involving convictions for Irish Republican Army (IRA) bombings that killed and seriously injured scores of innocent people (see for instance, Woffinden, 1987), were not being referred back to the Court of Appeal (Criminal Division) (CACD) for political as opposed to legal reasons. The key cases linked with the setting up of the CCRC are the infamous Guildford Four (see Conlon, 1990) and the Birmingham Six (Hill and Hunt, 1995). The case of the Guildford Four relates to Gerry Conlon, Paul Hill, Carole Richardson and Patrick Armstrong who were convicted and given life sentences in 1975 for the IRA pub bombings in Guildford, Surrey, which killed five people and injured over 100 others. The case of the Birmingham Six relates to the convictions of Paddy Joe Hill, Hugh Callaghan, Richard McIlkenny, Gerry Hunter, Billy Power and Johnny Walker for two IRA pub bombings in Birmingham in 1974 that killed 21 people and injured 162 others.

It is crucial to note, however, that the foregoing examples of notorious miscarriages of justice and momentous reforms that have shaped the criminal justice system were not overturned by the normal machinations of the criminal justice system. On the contrary, they were hard fought for. And a salient feature of all of the cases cited is that they were able to generate national and even international campaigns which were able to induce widespread public crises of confidence in the workings of the criminal justice systems at the time. It was those campaigns that were able to force the governments of the day to intervene and introduce the subsequent reforms of the criminal justice system to correct the apparent failings. In the Beck case, the furore caused by the press coverage of his wrongful convictions led to public demands for an investigation into how such a gross miscarriage of justice could occur. This prompted the government of the day to launch an official commission of inquiry (see *The Times*, 1904). It concluded that the responsibility lay primarily with the trial judge and that the problem could have been rectified had Beck had an opportunity to appeal against his ruling (Whiteway, 2008). The problem at the time was that the only way to

appeal against an alleged miscarriage of justice was through the Royal Prerogative of Mercy by a petition to the Home Office, the success of which often depended upon whether it was supported by an influential person who had taken an interest in the case (see Pattenden, 1996: 30; discussed further in Chapter 6 in this book). As Risinger (2006) noted, the most significant consequence of the Beck case, then, was that it firmly established 'the necessity of providing a judicial forum to consider new evidence of actual innocence, since executive clemency through the Home Office was too political and unpredictable'.

The campaign for Timothy Evans was also widespread and included notable supporters such as Michael Eddowes, a high-profile lawyer who wrote *The Man on Your Conscience* in 1955 following his investigation into the case. In it he argued that Evans could not have been the killer of his daughter and the most likely murderer was his landlord, John Christie (see Eddowes, 1955). Eddowes' book was followed by another book about the case by Ludovic Kennedy, an influential television journalist and public figure. In *Ten Rillington Place*, Kennedy (1961) further developed the thesis that a man of subnormal intelligence had been used as a scapegoat by the police and had been a 'fall guy' who had been hanged for Christie's crimes. This fuelled a widespread concern among the public that an innocent person had been executed in error and consolidated the campaign for the abolition of capital punishment. It led to a vote in Parliament in 1965 to suspend the death penalty for five years when Sidney Silverman's private member's bill was passed. The following year Timothy Evans received a posthumous pardon from the Queen. And in 1969 capital punishment was totally abolished in the UK.

As for the convictions in the *Confait* affair and the cases of the Guildford Four and the Birmingham Six, the campaigns in both episodes were so successful that they led to various official inquiries and royal commissions. More specifically, the *Confait* affair spawned an official inquiry that was conducted by Sir Henry Fisher (see Fisher, 1977), which found that the police investigation was geared simply to manufacturing an incriminating case against the three accused. The Royal Commission on Criminal Procedure (1981) (RCCP) followed the Fisher Report (Fisher, 1977), which recommended the introduction of PACE (see Royal Commission on Criminal Procedure, 1981). The case of the Guildford Four invoked three inquiries by Sir John May (see May, 1990, 1992, 1994). These were extended by the Royal Commission on Criminal Justice (RCCJ), announced on 14 March 1991, the day that the Birmingham Six overturned their convictions in the CACD, which recommended the establishment of the CCRC (see Royal Commission on

Criminal Justice, 1993; for an extensive discussion of the foregoing examples and the link to reforms of the criminal justice system, see also Naughton, 2007: ch. 4).

As such, there is a discernible vital link between reforms to the criminal justice system from the lessons learned from an analysis of successful appeals to determine the causation of miscarriages of justice or the obstacles to them being overturned. Such reforms have improved the safeguards against similar occurrences in the future for all members of society and/or provided the appeal mechanisms to overturn them if and when they do occur. Despite this, those individuals and/or organisations that assist alleged victims and/or strive to reveal the wrongs of the criminal justice system when convictions are overturned have often been depicted as 'troublemakers' and even as 'enemies of the state'. Ludovic Kennedy, for instance, was involved with numerous campaigns for high-profile victims of miscarriages of justice, apart from the Timothy Evans case, for almost 50 years before his death in October 2009 (for some of the most significant cases that he supported, see Kennedy, 2002). In his book, *Thirty-Six Murders and Two Immoral Earnings* (Kennedy, 2002), he described the theme of much of his work as an examination of police corruption and judicial complacency. In 1994 he was knighted for his services to journalism and came to be seen as something of a national treasure towards the end of his life. Yet, his obituary observed that his efforts were regretted by some in the establishment as the effect was often to undermine public confidence in the police and criminal justice system in general (see *The Telegraph*, 2009). Similarly, for his part in helping to find the true perpetrators of the IRA bombs that killed and injured the victims in the Birmingham Six case (see Mullin, 1986), Chris Mullin, the investigative journalist turned Labour MP who went on to establish the Department of Justice within the Home Office, found himself on the front cover of *The Sun* newspaper alongside the headline: 'LOONY MP BACKS BOMB GANG'. The list goes on and includes notable figures such as Paul Foot, the editor of the *Daily Mirror* at the forefront of the campaign for the Bridgewater Four (see Foot, 1986, 1997). It includes Gareth Peirce, the solicitor who helped to overturn the convictions of the Guildford Four and the Birmingham Six, and who was immortalised when played by Emma Thompson in the film about the Guildford Four case, *In the Name of the Father*. It includes, David Jessel, the producer of the BBC television series *Rough Justice* and then Channel 4's, *Trial and Error*, which contributed to overturning around a dozen miscarriages of justice (see Naughton, 2007: 197). It includes Bob Woffinden, the investigative journalist who has

devoted much of his professional life to revealing miscarriages of justice. In short, all of whom have been seen at some time or other as troublemakers who were somehow against the criminal justice system due to the orientation of their concerns.

For some who strive to overturn or reveal miscarriages of justice to be seen as in some way anti-establishment or in some way against the criminal justice system is not seen as necessarily problematic and such a depiction has even been embraced. Michael Mansfield QC, for instance, perhaps the most high-profile criminal barrister of his generation who acted for the Guildford Four and Birmingham Six, is, apparently, quite happy to refer to himself as a 'radical' lawyer in his memoirs. In it he recounts how he was aware that members of the judiciary had regarded him as a 'dangerous radical' throughout his working life, based on the controversial cases that he took on (see Mansfield, 2009: 150). On the back cover of his book, Mansfield celebrates the review by the *Sunday Times* that declared: 'The Establishment loathes him'. Similarly, Shami Chakrabarti, Director of the leading human rights organisation, Liberty, which has a long history of assisting victims of miscarriages of justice, embraced Jon Gaunt's description of her as the 'most dangerous woman in Britain' in his column in *The Sun* newspaper on 19 June 2007. In a keynote speech to the Police Foundation John Harris Memorial Lecture in July 2008, she even went so far as to describe herself in positive terms as a 'professional troublemaker' (Chakrabarti, 2008: 367).

Aims

Against this background, an analogy with factory maintenance engineers seems apposite as a way of framing the various analyses of this book. Indeed, it would be bizarre to think of factory maintenance engineers who respond to reported failures with factory plant or machinery breakdowns as troublemakers or somehow 'enemies of their factories'. The whole *raison d'être* of factory maintenance engineers is, rather, to troubleshoot and/or address reported failures in the machinery of their factories so that the manufacturing process runs smoothly. Similarly, and whether those so labelled reject or accept the idea that they are troublemakers, this book puts forward the alternative thesis from a sociological perspective that the endeavour to unearth miscarriages of justice is better seen as part of the overall *troubleshooting* of the criminal justice system. Troubleshooting the criminal justice system is conceived here as a necessary part of a diagnostic enterprise of critical sociological

interrogation to identify the nature, causes and extent of the problematic termed miscarriages of justice and the capabilities of the existing mechanisms for dealing with them. Conceptually, it is part of the overall maintenance of the criminal justice system that seeks to help to better understand the failings, or what I term as the 'black spots' of the criminal justice system that can either cause miscarriages of justice or prevent them from being overturned. It is a necessary precursor to fixing the flaws of the criminal justice system that are revealed in analysis of miscarriage-of-justice cases.

Indeed, like any social system, the criminal justice system has many known black spots that render it vulnerable to accidental mistakes or even intentional transgressions. For instance, PACE was introduced to provide safeguards for suspects of crime and to prevent wrongful convictions from occurring by requiring, for instance, that interviews are tape-recorded. Yet, we know that miscarriages of justice are still possible when suspects are 'verballed' 'off the record' and by other forms of negotiation and coercion on the way to the police station and when they are in the holding cell prior to the formal tape-recorded interview (see for instance, Eades, 2010: 237). Such forms of critical knowledge are useful as they can assist in devising strategies and reforms that can guard against possible miscarriages of justice from being caused by such black spots. In response to the problem of off-the-record verballing, to stay with the same example, a possible solution could be that police officers are no longer permitted to enter into conversations with suspects unless they are tape- or video-recorded, which could easily be enabled with portable recording devices. This would not only act to protect police suspects from miscarriages of justice, but would also protect the police from possible false allegations of malpractice and misconduct, thereby contributing to promoting public confidence in the criminal justice system and the rule of law.

More specifically, this book is a sociological exploration of the criminal justice system through the lens of how it deals with claims of innocence by alleged victims of miscarriages of justice. It considers:

- the different perspectives and definitions of 'miscarriages of justice';
- the causes of wrongful convictions in terms of whether they were caused intentionally or unintentionally;
- the limits of how the criminal justice system deals with claims of innocence by alleged victims of wrongful convictions, with a focus on the Parole Board, the Court of Appeal (Criminal Division) (CACD) and the Criminal Cases Review Commission (CCRC);

- the likely scale of the problem and the harm suffered by primary and secondary victims; and
- the limits of state relief in the form of statutory compensation available to victims of miscarriages of justice who overturn their convictions on appeal.

This diagnostic endeavour of the black spots of the criminal justice system is a necessary precursor to devising strategies on how to respond to the causes of wrongful convictions and the barriers that currently exist in terms of overturning alleged wrongful convictions.

In troubleshooting the criminal justice system, however, this book does not indulge in speculations about miscarriages of justice or unsupported critiques of the limits of the criminal justice system in dealing with them. On the contrary, the analyses presented here are all drawn from already achieved successful appeal cases, which represent an official, systemic acknowledgement that the criminal conviction that was overturned by the appeals system was erroneous or wrongful in some way (see also Naughton, 2007: ch. 2). As such, this book barely touches on the subject of alleged miscarriages of justice. That said, the miscarriages of justice that can be/are caused by social actors working both inside and outside of the criminal justice system, as well as by the structures and procedures of the criminal justice system itself, will be an ever-present spectre in the chapters that follow. This is especially the case in those chapters covering the different approaches to defining miscarriages of justice, understanding how they are caused and the limitations of the official mechanisms that exist for alleged victims to overturn them.

Structure

The book is structured into four parts: Part I deals with the nature and causes of 'miscarriages of justice' and 'abortions of justice', with the latter being a new concept for this book to distinguish between intentional wrongful convictions from those that were unintentional; Part II with the limits of the criminal justice system in dealing with claims of innocence by alleged victims of wrongful convictions; Part III looks at the harmful consequences of miscarriages of justice and the limits of the redress in the form of state compensation provisions for victims of miscarriages of justice; and Part IV provides a conclusion to the book that reflects on the critical diagnoses in the preceding chapters to suggest reforms to improve the existing black spots that have been identified.

In more specific terms, the next chapter shows that the term 'miscarriages of justice' is problematic as a catch-all term for the diverse phenomena that the phrase is employed to include. Structured into two parts it, first, explores three identifiable perspectives in miscarriages of justice studies: (1) a lay perspective that sees miscarriages of justice as relating to either factually innocent victims of wrongful convictions or factually guilty offenders who escape justice; (2) a criminal-justice-system perspective that sees miscarriages of justice in an altogether different way, relating simply to breaches of the prevailing rules and procedures of the existing criminal justice system; and (3) a due process perspective that sees any breach of due process or enacted human rights as examples of miscarriages of justice. It then distinguishes between 'miscarriages of justice' and 'abortions of justice' in terms of whether there is evidence that the wrongful convictions was intentional or not intentional in the successful appeal. It considers how these two distinct phenomena relate (or do not relate) to the lay perspective and wrongful conviction of the factually innocent, emphasising the different normative assumptions underpinning each of the different identifiable categories.

From this starting point, Chapters 3 and 4 look deeper into the causes of abortions of justice and miscarriages of justice, respectively. These chapters are each structured into two broad parts in terms of how the causation of abortions of justice and miscarriages of justice relate either to agents that are internal or external to the criminal justice process and to the forms of evidence that are admissible in criminal trials. More specifically, in terms of abortions of justice, Chapter 3 shows how police officers and Crown prosecutors intentionally breach their governing statutes and regulatory codes and how witnesses make false allegations to secure convictions. As for miscarriages of justice, Chapter 4 shows how the legislative framework of the criminal justice process is stacked against suspects and defendants, meaning that factually innocent individuals are vulnerable to conviction without intent by police officers, prosecutors who work within their guidelines and by witnesses who give inherently unreliable evidence in good faith that the courts accept as admissible.

Chapter 5 looks at the vital role of the Parole Board in the wrongful conviction problematic as it, generally, makes the decisions about whether prisoners maintaining innocence serving convictions for serious criminal offences can be progressed through the prison system and be possibly released safely back into society. It highlights the 'parole deal', a form of coercion akin to a plea bargain which means

that prisoners who maintain innocence and refuse to complete specified accredited offending behaviour programmes that are listed on their sentence plans may never be recommended to be released by the Parole Board. It presents the findings of survey research on the key obstacles to progression and release that confront prisoners maintaining innocence who require a recommendation from the Parole Board. It considers the justifications that the Parole Board put forward to support its continuation with its current method of risk assessment based on cognitive psychology and the perspective that if prisoners are taught to think differently then they will reduce their risk of reoffending. Finally, the chapter considers a possible way forward that moves beyond a mere psychologically oriented perspective on why prisoners maintain innocence with the application of a socio-legal perspective. More specifically, it engages with claims of innocence by prisoners maintaining innocence to reveal a range of different reasons for why prisoners say they are innocent when they are not, and which cannot be attributed to psychological denial. It also establishes that some prisoners maintaining innocence may, in fact, be innocent, a possibility that the Parole Board has not acknowledged or made accommodation for in its risk assessments and decisions.

Chapter 6 traces the origins of the criminal appeals system. Focusing on the CACD and appeals against serious criminal offences given in the Crown Court, it details the various statutes that have governed its operations since it was established in the early years of the twentieth century. It shows that the current CACD criteria for quashing convictions on the basis that they are 'unsafe' means that factually guilty appellants can be successful on appeal while factually innocent victims of wrongful conviction may not have admissible grounds of appeal; they may be procedurally barred. This stems from a concern that trials are 'fair' and with breaches of due process and points of law and not with whether appellants are factually innocent or guilty. A particular conflict with a lay perspective on how the criminal appeals system should operate is if the evidence that alleged factually innocent appellants want to present to the CACD was or could have been available at the time of the original trial such evidence may not be accepted as admissible. This is far removed from the concern for potentially factually innocent victims of wrongful convictions that lay at the heart of the introduction of the criminal appeal system just over a century ago. Despite this, there is a discernible due process perspective in the literature that will be evaluated that appears to have lost sight of the original intention that the appeals system should provide relief to factually innocent victims of wrongful conviction.

Chapter 7 looks at the CCRC, the last resort for alleged factually innocent victims of wrongful conviction who fail to have their convictions overturned in the normal appeals system. It considers the ability of the CCRC to assist applicants who claim that they are factually innocent of Crown Court convictions for serious criminal offences in two broad parts. First, it compares how the CCRC differs from what was recommended by the RCCJ, that is, a focus on whether there is a 'real possibility' that the CACD will see the conviction as legally unsafe rather than the question of whether applicants are factual innocent or guilty. It shows that the CCRC's 'real possibility test' means that the factually innocent may not have their convictions referred to the CACD while the convictions of the factually guilty will be referred by the CCRC (and overturned by the CACD) if they are believed to fulfil the test. Second, the type of cases that the CCRC reviews are considered in the context of its claimed 'success' rate. This reveals the wide range of matters that the CCRC deals with which the previous system for dealing with alleged wrongful conviction post-appeal did not. It shows that the CCRC's contribution to overturning Crown Court convictions is actually less than its predecessor, despite having a greater budget and staff cohort. Finally, the chapter provides a critical analysis of four dominant lines of defence that are routinely deployed in attempts to counter critiques of the CCRC's structural limitations in assisting the factually innocent.

Chapter 8 explores the harm caused by wrongful convictions to direct and secondary victims through case studies of successful appellants in the various appeal courts. As such, the analyses in this chapter are not intended to be definitive, nor is it claimed that all direct and secondary victims will experience the impacts of successful appeals in the same or even similar ways. Rather, the aim is to develop a holistic victimology of successful appeals that takes into account the harms that can befall all successful appellants in whichever appeal court the conviction is overturned and whether it is within or outside of the normal appeals process. Finally, an alternative perspective is critically analysed to show that the criminal justice system and its advocates operate within a restrictive analytical framework that is narrowly focused only on successful appeals that are overturned following a referral by the CCRC. This means that the harmful impacts that can occur to the overwhelming number of successful appellants who overturn their convictions within the normal appeals system and to any associated secondary victims are totally excluded from their gaze and their general concerns.

Following on from this, Chapter 9 evaluates the statutory compensation scheme for victims of miscarriages of justice in England and Wales

under s.133 of the Criminal Justice Act 1988. In three parts it, first, considers the now terminated ex-gratia scheme to show the important part that it played in providing financial redress to factually innocent successful appellants who overturned their convictions through the normal appeals process and for the harm caused to victims of police misconduct and other public officials more generally. Second, it shows that due to the narrow definition of what constitutes a miscarriage of justice under the statutory compensation scheme most successful appellants who have their convictions quashed in an appeal court will not be eligible for compensation. Finally, it assesses the caps that now apply and the deductions routinely taken from the awards to eligible applicants. This reveals that those who do receive compensation from the statutory scheme may not be adequately compensated for the harms and losses that they suffer.

The book concludes with a critical reflection of the black spots that were identified in the preceding chapters and with ideas for how they may be eliminated. Overall, it is concluded that there needs to be a more sincere commitment from the criminal justice system and agents who work for it to protect the innocent from wrongful convictions and to assist the innocent to overturn their convictions when they occur.

Index